

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

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Subject: Overview of Public Generally Regulations as Applied to General Plan Decisions

Date: May 23, 2003

I. INTRODUCTION

This regulatory project was initiated to address concerns raised by the County of San Diego regarding application of the “public generally” exception of the conflict-of-interest rules to general plan decisions affecting an entire jurisdiction.¹ According to the San Diego County Counsel, disqualification in these situations is a problem because it often prevents an official from representing the district he or she was appointed or elected to represent. The primary criticism of the rules is that it is difficult to determine whether property held by a “significant segment” of the public is affected in “substantially the same manner” as the official’s property. These are the two required elements for applying the exception once a public official determines he or she cannot participate in a governmental decision due to his or her financial interests in the decision.

According to the county counsel, this determination requires costly and time-consuming appraisals. Therefore, officials often disqualify themselves from participating in decisions important to their jurisdictions or districts. This jurisdiction has developed a “public generally” exception regulatory proposal for Commission consideration, addressing general plan decisions where an official has an economic interest in real property or a business entity.

To solicit broad public input, Commission staff held several interested persons’ meetings in both Sacramento and San Diego. These meetings were well-attended by representatives from a number of city and county agencies.² Many representatives of

¹ Comment letters of County Counsel John Sansone, dated September 19, 2001, September 25, 2001, and December 20, 2002 (Attachment 1)

² The meetings took place on July 12, 2002 (Sacramento), September 19, 2002 (San Diego), and February 6, 2003 (Sacramento). Attendees included representatives from offices for the San Diego County Counsel, San Diego City Attorney, Ventura County Counsel, Napa County Counsel, Town of Windsor, Monterey County Counsel, the California Association of Realtors, and the Governor's Office for Planning and Research.

jurisdictions in attendance were also concerned with the potential disqualification of their officials in general plan decisions, expressing interest in using the “public generally” exception as a way of allowing officials to participate in at least jurisdiction-wide general plan decisions. Other alternatives presented by staff, discussed in this memorandum, were considered to be useful by representatives of a few jurisdictions.

Recently, some small jurisdictions also raised concerns with the “public generally” exception, but with respect to the application of the exception where the disqualifying financial interest is an official’s principal residence. They explained that elected officials are unable to represent their constituents as a result of the disqualification rules under the Political Reform Act (“the Act”).³ The Commission considered amendments to a specialized “public generally” exception (former regulation 18707.3) applicable only to small jurisdictions. After considering these issues at several Commission meetings, at its January 2003, meeting the Commission decided that the “public generally” exception applicable to small jurisdictions was no longer necessary and should be repealed. The Commission, however, directed staff to continue examining application of regulation 18707.1, which provides a general “public generally” exception applicable to all jurisdictions, to the various scenarios previously raised by representatives of small jurisdictions.

Consequently, the focus of this memorandum is on the “public generally” exception. Based on requests for formal advice received in the recent past and public input during the course of this regulatory project, staff has identified the following additional relevant issues:

- 1) *Material Financial Effect*: Some jurisdictions view as difficult the requirement that public officials acquire data (i.e., facts) rebutting existing regulatory presumptions that a general plan decision will have a material financial effect upon their interests in real property or business entities. (Regulation 18705.1(b) and (c); regulation 18705.2; regulation 18705.3(a) and (b)(1).)
- 2) *Foreseeability*: It appears that public officials frequently do not evaluate whether there is a “reasonably foreseeable” material financial effect on the public official’s economic interests. If a material financial effect is not reasonably foreseeable, no conflict of interest exists. (Regulation 18706.)
- 3) *Segmentation*: A public official may isolate a particular general plan decision that prompts disqualification from other decisions to permit the official to participate in some, but not all, decisions. This process of segregating decisions is not codified in the Commission’s regulations.

³ All citations are to the Government Code sections 81000 – 91014 unless otherwise noted. All regulatory citations are to Commission regulations at Title 2, sections 18109 – 18997, of the California Code of Regulations.

Therefore, public officials who can utilize the “segmentation process” may not be aware of its potential application.

4) *Education*: It is possible that the public’s unfamiliarity with the more recently adopted specialized form of the “public generally” exception applicable to residential properties (regulation 18707.9) may account for some of the difficulty with respect to general plan decisions.

This memorandum provides an overview of general plan laws, summarizes staff advice in this area and pertinent regulations, and discusses all approaches considered to address the issues identified above with a focus on the public generally exception as noted. In this memorandum, assuming the Commission agrees there is a problem to be addressed, the Commission is asked to provide guidance on staff’s recommendation that certain specific approaches be eliminated. (See Recommendations 1 – 3 at pages 10, 12 and 19, respectively.)

Regulatory proposals presented at this time relate to the “public generally” exception (including the San Diego County proposal) and the “segmentation process.” The specific regulatory proposals are discussed in separate memoranda. (See staff memoranda dated May 23, 2003, “Pre-Notice Discussion: Adoption or Amendment to Conflict-of-Interest Regulations (General Plan Decisions)” and “Pre-Notice Discussion of Proposed Regulation 18702.6. - “Segmentation” Rules.

II. GENERAL PLAN LAWS

A. Overview

California law requires each city and county to adopt a general plan “for the physical development of the county or city, and any land outside its boundaries which ... bears relation to its planning.” (Section 65300.) (*General Plan Guidelines*, Governor’s Office of Planning and Research, p. 10 (1998).)⁴ Pursuant to state law, subdivisions, capital improvements, development agreements, and many other land use actions must be consistent with the adopted general plan. (*Ibid.*) In counties and general law cities, zoning and specific plans are also required to conform to the general plan. (*Ibid.*)

According to Curtin-Talbert, *Curtin’s California Land Use and Planning Law* (22nd Edition, 2002), the general plan provides:

“... the blueprint for development throughout the community and is the vehicle through which competing interests and the needs of the

⁴ To assist local governments to prepare a comprehensive, long-term general plan, Government Code section 65040.2 directs the Governor’s Office of Planning and Research to adopt and periodically revise guidelines for the preparation and content of local general plans. (*General Plan Guidelines*, at p. 8) These guidelines are advisory, but the document is the state’s only official document interpreting and explaining California’s legal requirements for general plans. Planners, decisionmaking bodies, and the public depend upon the *Guidelines* for help when preparing local general plans. The courts have periodically referred to the *Guidelines* for assistance in determining compliance with planning law.

citizenry are balanced and meshed. The general plan addresses all aspects of development, including housing, traffic, natural resources, open space, safety, land uses, and public facilities The general plan consistency doctrine was imposed in California in 1971 [by the state Legislature] The initial 1971 legislation [footnote omitted] and subsequent amendments ... transformed [the general plan] from an ‘interesting study’ to the basic land use charter that embodies fundamental land use decisions and governs the direction of future land use in the city’s jurisdiction” (*Curtin, supra* at pp. 7-8.)

¶ . . . ¶

“The general plan shall consist of a ‘statement of development policies’ and must include diagrams and text setting forth ‘objectives, principles, standards, and plan proposals.’ (Government Code § 65302.) The general plan shall consist of seven mandatory elements and any optional element that the city chooses to adopt” (*Curtin, supra* at p. 9.)

¶ . . . ¶

Additionally, “area plans” or “community plans” are part of the general plan and focus on a particular region or community within the overall geographical area. (*Guidelines, supra* at p. 17.) An area or community plan must also be internally consistent with the general plan of which it is part. (*Ibid.*)

Decisions involving real property often involve specific plan decisions. A “specific plan” is a document created *outside* of a general plan and contains a blueprint for development of discrete locations of varying size. The specific plan adoption process may be initiated by a private party (such as an owner or developer of a particular grouping of real properties) or by the agency itself (as would be the case for the development of a business district or particular area of the jurisdiction’s downtown). A specific plan may consider elements that are also elements of a general plan and engenders many of the same concerns with respect to potential conflicts of interest. By statute and caselaw, specific plans are required to be consistent with a jurisdiction’s general plan. (*Woodland Hills Residents Assn. v. City Council* (1975) 44 Cal.App.3d 825.)

B. Land Use Element

The seven mandatory elements of a general plan are: land use, circulation, housing, conservation, open space, noise, and safety. (Government Code section 65302; *Curtin, supra* at p. 10.) All of these elements must be consistent with one another. (*General Plan Guidelines, supra* at p. 13; *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90.)

“The land use element [of a general plan] designates the type, intensity, and general distribution of uses of the land for housing, business, industry, open-space, education, public buildings and grounds, waste disposal facilities, and other categories of public and private uses.” (*General Plan Guidelines, supra* at p. 18.)

“This element serves as the central framework for the entire plan and is intended to correlate all land use issues into a set of coherent development policies. Its goals, objectives, policies, programs, diagrams, and maps relate directly to the other elements. See Government Code § 65302(a). All general plan elements carry equal weight. *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 708. However, in practice, the land use element is the most visible and frequently used.” (*Curtin, supra* at p. 10.)

While the land use element is only one of seven mandatory elements having equal legal status making up a general plan, for practical purposes, this element is considered the linchpin for the other elements of the general plan.⁵

C. Important Points

Important points for purposes of understanding the application of the conflict-of-interest provisions of the Act to general plan decisions are summarized below:

- 1) The seven mandatory elements of a general plan are of equal weight and must be consistent with one another. Thus, amendment of one element of a general plan may have a “ripple effect” on other elements, requiring their amendment as well. Thus, all general plan elements can be considered as “related”;
- 2) General plans may be amended by private or public initiative, the most common, according to *General Plan Guidelines, supra*, being an amendment associated with a privately-initiated development project.⁶ Amendment of the required elements of a general plan may occur no more than four times in a year.⁷ The land use element of a general plan is required by statute to be updated at least once every five years;
- 3) Quantifiable standards of population density must be provided in the general plan for each land use category contained in the plan. Population density can best be expressed as the relationship between the number of

⁵ The land use element has perhaps the broadest scope of the seven mandatory elements and is often perceived as being the most representative of the general plan. (*General Plan Guidelines, supra* at p. 38.)

⁶ See e.g. *Hensley* Advice Letter, No. A-01-291 (developer acting as agent for property owner); *Barrow* Advice Letter, No. A-01-261 (property owner would apply for general plan amendment); *Whittier* Advice Letter, No. A-99-257 (property owner seeks to build - use of property owner's property under consideration as part of housing element); *Rudnansky* Advice Letter, No. I-90-429 (developers seek redesignation of land use as part of general plan amendments).

⁷ Gov. Code § 65358(b).

dwellings per acre and the number of residents per dwelling.⁸ Current estimates of the average number of persons per household in a general plan jurisdiction are available from the Demographic Research & Census Data Center of the State Department of Finance;⁹ and

4) Some general plan amendments facially apply to the entire jurisdiction, but in practice affect only a discrete property or area in the jurisdiction.¹⁰

III. HISTORY

CONFLICT-OF-INTEREST REGULATIONS AND PUBLIC GENERALLY EXCEPTION

The Act prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100, et seq.) A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the economic interests specified in sections 87103(a) – (e).

A. Conflict-of-Interest Regulations - Standard Eight-Step Conflict-of-Interest Analysis

The Commission's conflict-of-interest regulations are presently structured around an eight-step standard analysis, adopted in 1998 when the regulations were re-numbered and re-ordered as Phase 1 of the Conflict of Interest Improvement Regulatory Project, and substantively amended in 2001 as Phase 2 of that project. This eight-step standard analysis defines a conflict of interest that disqualifies a public official from the governmental decisions of his or her agency. Since public officials are presently confronted with deciding whether they have a disqualifying conflict of interest under the eight-step standard analysis, that analysis and the Commission's related regulations are summarized in the Commission's publication "Can I Vote," which is posted on the Commission's website. Copies of this publication are frequently provided by staff to public officials who request written advice. The Commission's website also displays a slide show presentation of the analysis ("Conflicts of Interest: Regulatory Changes").

The primary form of the public generally exception is embodied in regulation 18707.1 (Attachment 2). Currently, there are also six specialized forms of the public generally exception. (Regulations 18707.2-18707.9.)

⁸ *Camp v. County of Mendocino* (1981) 123 Cal.App.3rd 334; *Woodruff* Advice Letter, No. A-01-157 (City of Oakley provided total number of, and acreage for, developed residential parcels, based on census data, so as to compare council member's lot size to average residential lot size.)

⁹ *General Plan Guidelines*, *supra* at p. 38.

¹⁰ See e.g. *Montandon* Advice Letter, No. A-93-182 (adopting a circulation element applicable to entire jurisdiction; however, element proposed constructing a traffic median on a particular road within the city); *Solely* Advice Letter, No. A-93-107 (general plan amendment that decreased the number of housing units that could be added to three discrete neighborhoods).

In 2001, during Phase 2 of the Regulatory Improvement Project, the Commission added regulation 18707.9. Regulation 18707.9 is a specialized form of the public generally exception potentially applicable when a decision has a reasonably foreseeable material financial effect upon a public official's interest in real property. There have been other relatively minor changes to these regulations subsequent to that date, with the repeal of former regulation 18707.3, applicable to small jurisdictions, as the most notable and recent change.

In brief, these eight steps are:

1. Is the individual a "public official"?
2. Will the public official be making, participating in making, or influencing a governmental decision?
3. What are the public official's economic interests?
4. Will one or more of those economic interests be directly or indirectly involved in the governmental decision?
5. Based on the applicable materiality standard, is the financial effect of the governmental decision on those economic interests "material"?
6. Is the material financial effect of the governmental decision on the public official's economic interests reasonably foreseeable?

If the answers to all of the above are yes, then the public official will have a conflict of interest with respect to the governmental decision of his or her agency and the analysis proceeds to the exceptions at steps 7 and 8 in order to determine whether the official is disqualified from the decision:

7. Does the "public generally" exception apply?
8. Is the public official legally required to participate in the governmental decision?

If either of these latter two questions can be answered in the affirmative, the public official may be involved in the decision, notwithstanding the existence of a conflict of interest.

While every element in Steps 1 - 6 must be present for a conflict of interest to exist, most frequently the key steps with regard to general plan decisions are Steps 4 - 6 (deciding whether there will be a reasonably foreseeable material financial effect on the official's economic interests), followed to a lesser extent by Step 7, invoking the public generally exception.

Also part of the conflict-of-interest analysis is the concept of “segmentation,” which provides a process that allows an official to segregate a decision in which the official has a conflict of interest from other decisions in which he or she does not have a conflict of interest. This process facilitates participation by the official in one or several related decisions and is viewed by staff as a viable approach for enhancing a disqualified official’s participation in general plan decisions. As mentioned earlier, the segmentation process is not presently codified and is presented to the Commission for consideration in a separate memorandum since its application extends beyond general plan decisions.

A public official’s disqualification from participating in general plan decisions most frequently arises due to his or her economic interest in real property and, to a lesser extent, interests in business entities arising either through investments, positions of management, or receipt of income.

B. Direct/Indirect Involvement & Implications for Materiality (Steps 4 and 5)

The potential for a conflict of interest first becomes apparent in Steps 4 and 5 of the eight-step process when the applicable materiality standard is identified.

1. Real Property

An official must determine if his or her interest in real property is directly or indirectly involved in a general plan decision. This determination is necessary in identifying the appropriate materiality standard applicable to real property (Steps 4 and 5 of the eight-step process) and usually has a significant impact on an official’s obligation to disqualify from a decision. (Regulation 18704.2.) If real property¹¹ is directly involved in a decision, the financial effect of the decision is presumed to be material.¹² (Regulation 18705.2(a)(1).)

Alternatively, if such property is indirectly involved in a decision, then the financial effect of the decision is presumed *not* to be material. (Regulation 18705.2.) Notwithstanding these presumptions, there still may be proof that the official has a conflict of interest due to the nature of the general plan or land use element decision. (See regulation 18705.2(b)(1).) This proof includes, but is not limited to, circumstances where the decision affects:

- “(A) The development potential or income producing potential of the real property in which the official has an economic interest;
- (B) The use of the real property in which the official has an economic interest;

¹¹ An interest in real property includes leaseholds. There are separate sets of factors applicable to leaseholds which may rebut the presumptions with respect to materiality. These factors are one or more of: the termination date of the lease; the amount of rent paid by the lessee; the value of the lessee's right to sublease the real property; the legally allowable use or the current use of the real property by the lessee; the use or enjoyment of the leased real property by the lessee.

¹² This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (*Ibid.*)

(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.” (Regulation 18705.2(b)(1).)

Staff has consistently advised that where the general plan decision has been coupled with a change in zoning, the official’s interest is directly involved based on regulation 18704.2(a)(2) which treats as “directly involved” the official’s real property that will be zoned or rezoned. (*Sansone* Advice Letter, No. I-03-058; see also *Wald* Advice Letter, No. A-99-302.) When adoption of a general plan is at issue and the decision also pertains to environmental review mandated by the California Environmental Quality Act, staff has advised that an official’s property located within a general plan area is directly involved. (*Woodruff* Advice Letter, *supra*.)

In general, Commission advice varies based on the details of the decision or the nature of the economic interest in question. For example, staff has also advised that an official’s real property in the general plan area is not directly involved in a general plan decision simply by virtue of being within the area subject to the general plan decision where the decision was an update to the housing element of the general plan. (*Whittier* Advice Letter, No. A-99-256.) This letter concluded that the official’s real property interests, even the parcel that was to be directly before the town council, were indirectly involved in a housing element decision for purposes of finding the applicable materiality standard applicable to a decision which dealt with identifying needs, goals, policies and objectives. In contrast, where a housing element decision specifically identified a site for development with the potential to produce an increase in traffic and intensity of use affecting the official’s property, the property was deemed to be directly involved. (*Condon* Advice Letter, No. I-02-035.)

2. *Business Entities*

As to business entities, unless a business entity (typically the public official’s source of income) is the applicant for a general plan amendment, the business entity is considered to be indirectly involved in the decision. (*Lindgren* Advice Letter, No. A-02-323; *Lindgren* Advice Letter, No. A-99-313; *Mattas* Advice Letter, No. A-02-076; *Jackson* Advice Letter, No. A-01-056.)

3. *Application of Direct/Indirect Involvement Standard*

While in most cases it is clear whether a business entity is directly or indirectly involved in a decision, staff considered as part of this project whether there was a need to simplify the rules regarding direct or indirect involvement where the official’s economic interest is real property located within the general plan area. Consequently, an approach to provide that certain general plan decisions *indirectly* involve an official’s property was the primary topic of the first interested persons’ meeting held on July 12, 2002. This approach was also discussed at the other two interested persons’ meetings held in

September 2002, and February 2003. As first discussed at the February meeting, the proposal was to add subdivision (b)(3) to regulation 18704.2 as follows:

“(3) The decision involves the initial adoption of a general plan for the entire jurisdiction.”

The effect of this language would be that real property would always be considered indirectly involved in a decision to initially adopt a general plan. As a result, it would be presumed that the real property would not be materially financially affected, absent proof that there are specific circumstances which “make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest.” (Regulation 18705.2(b)(1).) The rationale for this proposal is that a decision to adopt a general plan is mandatory and must apply to every parcel in the jurisdiction as compared to a general plan amendment which could be initiated by a private person and apply only to one or a few identifiable parcels. The adoption of a general plan is more in the nature of an ordinance, which is a rule of general application.

San Diego’s Concerns: The San Diego County Counsel does not believe that addressing jurisdiction-wide general plan issues at Steps 4 and 5 (Direct/Indirect Involvement) goes far enough to address their concerns since this amendment addresses only the applicable materiality standard. It appears that “specific circumstances” would likely require the application of an exception in many instances because general plans, by their nature, change or establish “uses” for real property. This is a “specific circumstance” that would rebut the presumption of non-materiality. (Regulation 18705.2(b)(1)(B).)

Enforcement Division Concerns: After weighing the pros and cons of this proposal in an enforcement context, the Enforcement Division determined that carving out an exception to the conflict-of-interest analysis for decisions involving the initial adoption of a general plan for the entire jurisdiction is not a good idea. This amendment would allow an official to make a decision that directly and materially affects his or her property by presuming that the material financial effect does not exist, especially since it may be clear that a material financial effect will result from a decision (e.g., where the adoption of a general plan would place restrictions on development of an official’s property). To the extent that a problem exists for officials with general plan decisions before them, the Enforcement Division comments that this issue is more appropriately addressed in the “public generally” step of the analysis (Step 7).

Staff Recommendation 1: Staff asks for guidance as to whether the staff should continue to pursue an alternative under Steps 4 and 5. For example, staff could explore whether the “specific circumstances” language should address certain general plan decisions. Staff, at this time, does not recommend further exploration of this approach. In part, staff’s segmentation proposal addresses participation in the adoption or final decision relating to a general plan while still disallowing participation in decisions leading up to that final vote.

C. Foreseeability (Step 6)

Step 6 of the eight-step analysis involves an evaluation of whether there is a “reasonably foreseeable” material financial effect on a public official’s economic interests. If the material financial effect is not reasonably foreseeable, no conflict of interest exists. To provide guidance on when a financial effect is “reasonably foreseeable,” the Commission recently amended regulation 18706 to include factors that could be considered in evaluating this step of the analysis. As part of this project, staff examined this step of the analysis to determine if additional regulatory amendments would address some of the concerns.

1. Real Property

A review of staff advice indicated that in most situations it is reasonably foreseeable that a material financial effect will result from development decisions. A new development, in particular, is likely to have a reasonably foreseeable material financial effect on surrounding property owners. (*Dixon* Advice Letter, A-95-272; see *Rudnansky, supra.*) As mentioned above, amendments to regulation 18706 now provide further guidance on how to make these determinations.

The Riverside Analysis: Foreseeability issues related to general plan decisions have also been examined in some length in a series of letters issued to the City of Riverside on behalf of its mayor and several council members who owned property within a general plan area. (*Stone* Advice Letter, No. A-92-133a; *Stone* Advice Letter, No. I-92-133; *Stone* Advice Letter, No. I-91-564; *Woodhead* Advice Letter, No. I-91-266; *Woodhead* Advice Letter, No. A-90-768.)

The second *Stone* letter, which was issued following discussion of the matter by the Commission, distinguished between two types of decisions. It first described decisions concerning inclusion, exclusion or modification of particular goals, policies and objectives. According to the letter, these types of decisions ordinarily would not have a reasonably foreseeable financial effect on the economic interests of the public officials distinguishable from the effect on the public generally, because the decisions affect the total population of the city by providing a general framework for the development of the plan. However, the letter advised that a particular goal, policy or objective could have a material financial effect on an official’s economic interest, and, in that case, disqualification would be required. In addition, other types of decisions, such as the inclusion, exclusion or change in the location of proposed roadways and modifications to land use categories, changes in the boundaries of land use categories, changes in the boundaries of other maps or diagrams, and changes to the draft general plan recommended by the planning commission may result in disqualification.

2. *Business Entities*

Commission staff has advised that because there are many variables to identify and analyze in order to determine whether it is reasonably foreseeable that certain decisions will materially affect an official's economic interest in a business entity (or source of income), those determinations must be made on a case-by-case basis. (See, for example, the *Woodhead* Advice Letter, No. I-91-266; *Lindgren* Advice Letter, No A-02-323; *Jackson, supra*; *Lindgren* Advice Letter, No. A-99-313.)

In advising about housing element decisions in the context of an amendment to a general plan, staff has advised that variables to consider are whether business activity will be impacted as a result of the decision, whether assets of the business such as real property will increase or decrease in value, why the decision is being sought, and who initiates the decision. (*Whittier* Advice Letter, A-99-257.) Staff has also advised that another factor is how far removed a decision to amend a general plan is from the actual decision to approve a specific project. (*Whittier* Advice Letter, *ibid.*, referring to the *Strauss* Advice Letter, No. A-96-034.)

Having examined staff's treatment of general plan decisions under Step 6, the viability of using the foreseeability analysis was presented by staff as an option at the September 19, 2002, interested persons' meeting. There was no interest in pursuing this further. The San Diego County Counsel believes that dealing with general plan decisions at Step 6 (foreseeability) would not resolve the concerns raised.

Staff Recommendation 2: Staff recommends discarding Step 6 as an approach for addressing the concerns raised.

D. The "Public Generally" Exception (Step 7)

The Act provides that a public official may participate in a governmental decision despite the existence of a disqualifying conflict of interest if the financial effect of that decision on the official's economic interests will not be *distinguishable from the decision's effect upon the public generally* [emphasis added]. (Section 87103; regulation 18700(a).) This qualifier is the genesis of the "public generally" exception embodied in Commission regulations 18707 - 18707.9. Under these regulations, the exception has two components: (1) all, or a *significant segment*, of the public within the agency's jurisdiction will be affected by the decision, and (2) the effect upon the public official's economic interest will be in *substantially the same manner* as the effect upon the significant segment. (Regulation 18707(b).)

The underlying logic for this exception is that while a decision may have a financial effect upon a public official's economic interests that is considered material, because the financial effect is not isolated to the public official, but will be shared at large across the agency's jurisdiction, or a significant segment thereof, the public official's financial interest may be congruent, rather than in conflict, with the public interests. (*In re Callanan* (1978) 4 FPPC Ops 33.)

1. *Commission Opinions*

There are three early Commission opinions that provide analytical tools to define the “public generally” and a “significant segment” of the public generally, with respect to general plan or specific plan decisions. The first opinion, *In re Owen* (1976) 2 FPPC Ops. 77 (“*Owen*”) involved three city council members faced with a vote on an amendment to a specific plan. The opinion considered the language “distinguishable from its effect on the public generally” as found in section 87103, and the related implementing language of then newly-promulgated regulation 18703, to find this language of the Act permitted two of the three council members to vote on the plan amendment. The following points can be gleaned from the analysis in this opinion:

- The members of a “significant segment” can be those in a core area who will be affected, or have the value of their interests affected, in a direct and particular manner from the agency’s decision. (2 FPPC Ops. at 81, 82.)
- An official will be affected in a manner distinguishable from the effect on the public generally when there is a peculiar and identifiable effect on the value of his or her economic interest(s). (2 FPPC Ops. at 81, 82).

In re Ferraro (1978) 4 FPPC Ops. 62 (“*Ferraro*”) concerned three council members, each with an economic interest in real property, who were confronted with a city council vote on a rent control ordinance. To address whether these officials could vote on the ordinance, the Commission considered whether owners of rental property constituted a significant segment of the public. The Commission opined that “[i]n order to be considered a significant segment of the public, we think a group usually must be large in number and heterogeneous in quality.” (4 FPPC Ops. at 67.)

Ferraro formally recognized that a significant segment of the public is distinguished by having a heterogeneous, and not homogenous, membership. Applying this principle to the facts presented, the Commission concluded, “In summary, as we construe it, the public generally doctrine means that an official who owns three or fewer residential units may participate in decisions affecting his financial interests because a large number of citizens who are not part of a common industry, trade, or profession or other homogeneous group will be similarly affected.” (4 FPPC Ops. at 68.)

This opinion has been partially codified in regulation 18707.9. Subdivision (a) of that regulation provides:

“The effect of a governmental decision on a public official’s real property interests is indistinguishable from the effect on the public generally if 5,000 or ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents are affected by the decision and the official owns three or fewer residential property units. A public official’s principal

residence, as defined in Title 2, California Code of Regulations, section 18707.3(b), does not count as a unit for purposes of this subdivision.”

The third member of this trilogy of opinions is *In re Legan* (1985) 9 FPPC Ops. 1 (“*Legan*”). This opinion was requested by a county supervisor in connection with an amendment to the county’s general plan that would double the allowable housing density for a discrete, unincorporated area of the county. The Commission was asked to consider whether the effect of this amendment on the supervisor’s employer would be in substantially the same manner as the effect upon a significant segment of the public generally.

Legan defines the public generally as being all *persons* residing, owning property, or doing business, in the *entire jurisdiction* of the agency. (9 FPPC Ops. at 15.) Based on the number of real estate *parcels* in the jurisdiction (e.g., the county) and the number of real estate *parcels* that would receive the increased housing density allowance, and *assuming each parcel has one owner*, the Commission concluded that the owners of the affected parcels lacked the number and heterogeneous quality to constitute a significant segment of the public.

2. Court Decisions

Consumers Union of United States v. California Milk Producers Advisory Board (1978) 82 Cal.App.3d 433 (“*Consumers Union*”) was a challenge to the Commission’s first regulation (regulation 18703) defining what constitutes an “effect on the public generally”. Regulation 18703 contained a proviso at that time stating that an industry, trade or profession did not constitute a significant segment of the general public. An exception was made if the agency was required or expressly authorized by law to draw its members from that particular industry, trade or profession.

On review, the court determined that this exception was consistent with section 87103 of the Act. It was lawful in those circumstances, the court concluded, for the regulations to contain an exception permitting industry board members to participate in governmental decisions affecting their economic interests, when the effect would be in substantially the same manner as the effect on others in the same industry, trade or profession.

In *Downey Cares v. Downey Community Development Commission* (1987) 196 Cal.App.3d 983 (“*Downey*”), the court was asked to review the decision of a trial court that vacated a redevelopment ordinance. The trial court vacated the ordinance because it was adopted with the participation of a city council member who had a conflict of interest under the Act.

On appeal, the council member argued that a decision to adopt the ordinance was distinguishable from a decision implementing an ordinance. Only the latter, it was urged, potentially affects economic interests. The appellate court rejected this argument. The court reasoned that, given the purpose of a redevelopment area plan to enhance the

economic value of the redevelopment area, it was reasonably foreseeable that either decision would have a material financial effect on real property and businesses located in the redevelopment area, including the council member's business and real property.

3. *Changes in Regulations*

The Commission's first regulation addressing circumstances in which the financial effect of a governmental decision upon a public official's economic interest would be considered indistinguishable from the effect upon the public generally was regulation 18703, adopted in 1976. This regulation took the form of a general rule conceptualizing the public generally exception as having the two prongs: 1) "significant segment" of the public; and 2) an effect that is in "substantially the same manner" as the effect upon that significant segment.

At that time, the Commission considered the purpose of a "public generally" exception, recognizing that the exception presented a number of complex issues. A staff memorandum to the Commission which sought to answer the question of how much of the public constituted a "significant segment" pointed out:

"Like other questions arising under the conflict of interest provisions, this question is not susceptible to a simple or mechanical answer. Many cases will arise that must be dealt with individually, for any regulation which attempted to establish a formula to resolve all cases would necessarily be arbitrary and in some applications unjust. On the other hand, there are certain questions which are definable and recurring, so that treatment by regulation is possible and appropriate." (Memorandum to Commission regarding "Distinguishable from the public generally," December 29, 1975.)

Subsequently, public generally regulations have undergone three significant series of changes, occurring respectively in 1993, 1998, and 2001. Each successive series of amendments retained and refined the two-pronged "significant segment" and "substantially same manner" method of applying the public generally exception, and expanded upon the specialized forms of this exception. As mentioned earlier, the most recent substantive change went into effect on February 25, 2003, when the Commission repealed the specialized form of the public generally exception previously applicable to small jurisdictions. These changes are summarized in **TABLE I** below:

TABLE I

Date	Regulations	Description of Change
3-22-1976	18703	Initial adoption - general rule and states a single industry, trade or profession may constitute a significant segment of the public generally if it is the predominant industry in the official's jurisdiction, or the agency's organic statute requires or permits an individual from the industry to be appointed to the agency in order to represent or advance the interests of that industry.
12-22-1988	18703.5	Defining significant segment of the public generally in context of the retail customers of a business entity that is an economic interest to a public official.
10-12-1990	18703.1	Adopted specialized form of public generally exception applicable when the affected economic interest is the principal residence of a public official serving in a small jurisdiction.
12-29-1993	18703 18703.2 18703.3	Amending regulation 18703 to delete reference to industries, trade, or professions as a significant segment of the public generally, in order to adopt this provision as new regulation 18703.2. Adopted 18703.3 as a specialized form of the public generally exception applicable to appointed members of boards and commissions. Amended 18703 to include numerical standards (\$ and %) to define "significant segment" , add election district as an alternate definition of public generally, and added "proportional or across-the-board" standard to define "substantially the same manner" with respect to decisions involving rates, charges and assessments.
11-23-1998	18703 - 18703.5 18707 18707.1 - 18707.6	Re-numbering and re-ordering regulations as Phase I of Conflict of Interest Regulations Improvement Project. Added specialized form of public generally exception applicable to ratemaking and similar decisions (18707.1) and to states of emergency (18707.6).
2-1-2001	18707 18707.1 - 18707.4 18707.7 18707.9	Phase II of Conflict of Interest Regulation Improvement Project. Substantive revision and re-numbering of public generally exception general rule and specialized form of exceptions. Added specialized form of exception applicable when a conflict of interest arises from a public official's ownership of residential property (18707.9).
2-25-2003	18707.3	Repeal of specialized form of public generally exception applicable to small jurisdictions.

4. *The General Rule, Regulation 18707.1*

Regulation 18707.1 defines a “significant segment” according to the type of economic interest that triggers the conflict:

- Personal financial effect.¹³ Gift or income from individual - impact on individuals in the jurisdiction or district represented by the official is analyzed
- Real property – impacts on owners¹⁴ of property in the jurisdiction or district represented by the official are analyzed¹⁵
- Investment, business position, gift or income from business – impact on businesses in the jurisdiction or district represented by the official is analyzed.

a. *Terms Defined*

While the Commission has quantified the term “significant segment,” the same is not true for the term “substantially the same manner.” **Table II** illustrates the differing treatment of the two concepts in how these terms are defined in current regulations:

Table II - Definitions for “Public Generally” Terms

“Significant Segment”	“Substantially the Same Manner”
Regulations 18707.1, 18707.2, 18707.4, 18707.5, and 18707.7 quantitatively define “significant segment.”	<i>Only</i> regulation 18707.9 explicitly states when a decision will affect an official's economic interest in “substantially the same manner.” ¹⁶ Regulations 18707.2 and 18707.4 include the “substantially the same manner” concept but do not specifically define this term.

¹³ For example, in a mobile home situation, an official's rental expenses or fees may be affected by the governmental decision and should be considered under a “personal financial effects” analysis.

¹⁴ A “property owner” generally refers to a person who owns improved or unimproved real property (commercial, governmental or residential). (*Nerland* Advice Letter, No I-02-059; *Furth* Advice Letter, No. A-99-035.) A “homeowner” means an individual who owns residential property that is his or her domicile or principal place of residence; thus, “homeowner” excludes a person who owns a non-owner occupied residential dwelling or commercial structure. (*Ibid.*)

¹⁵ As part of Phase 2 changes, the Commission deleted the term “households” from the “significant segment” analysis applicable to real property interests. Since the term “household” could include non-property owners, it tended to cause confusion about the type of information that was relevant for purposes of analyzing the exception when the conflict was triggered by ownership of real property. (Memorandum to Commissioners regarding “Final Adoption of Phase 2 Conflict of Interest Regulations ... November 28, 2000.) As a result, the Commission specifically limited the language of regulation 18707.1 to property owners or homeowners.

¹⁶ Subdivision (b)(5) of regulation 18707.9 states: “A public official will be affected in substantially the same manner for purposes of this subdivision if the decision will be applied on a proportional or ‘across-the-board’ basis on the official's economic interests as on other residential property owners or other owners of residential rental property affected by the decision.”

One reason why existing regulations do not specifically define the term “substantially the same manner” is that it is difficult to develop a “bright line rule,” as noted in staff’s 1975 memorandum, *supra*. In 1993 and 2000, the Commission grappled with creating a definition for this term, indicating an apparent need for further guidance on what exactly “substantially the same manner” means. In 1993, language meant to define this term was presented to the Commission:

“(b) The effect of the decision on the official’s economic interest is considered “indistinguishable” from the effect of the decision on the public generally if the effect of the decision on the official’s interest is no more than two-times greater or two-times less than the effect of the decision on the segment identified in subdivision (a) above.” (Memorandum to Commissioners regarding “Prenotice Discussion of the Proposed Amendment to Regulation 18703 ...” February 22, 1993.)

This language was ultimately excluded from the adopted regulation since staff believed that an objective test would be appropriate but as of that time had not found language that could be fairly applied to all situations. (Memorandum to Commissioners regarding “Prenotice Discussion of Amendment to Regulation 18703 ... April 26, 1993.)

In 2000, as part of Phase 2 of the Conflict of Interest Regulatory Improvement Project, the Commission reconsidered whether the phrase “substantially the same manner” should be specifically defined or tailored to apply to certain situations. It was determined that because this part of the public generally analysis is so factually based, it was not appropriate to define the term. The Commission ultimately decided that this determination should be made on a case-by-case basis. In the same year, the Commission determined that financial effects upon economic interests in real property could not be determined by proximity alone. (Memorandum to Commissioners regarding Final Adoption of Phase 2 Conflict of Interest Regulations . . . November 28, 2000.)¹⁷

A number of jurisdictions point out that it is difficult to ascertain what “substantially the same manner” means since it will vary from case-to-case. It has been proposed that “substantially the same manner” (regulation 18707.1(b)(2)) be interpreted to mean being applied to all real property generally, regardless of fair market value, in

¹⁷ Under staff advice issued prior to final adoption of Phase 2 conflict of interest regulations, where an official's property was within 300 feet of property which was the subject of the decision, the official's economic interest had been considered to be affected in "substantially the same manner" as other property owners only if a significant segment (10% of property owners) of the public also was within 300 feet from the subject property. The Commission approved regulatory language rejecting this line of advice, reasoning that it would be highly unlikely that ten percent of property owners would reside within 300 feet of the subject property. As a result, there is no longer a strict rule that distance from the subject property is conclusive of substantially similar effects. Instead, the Commission staff has recognized that multiple factors can create effects upon an official's economic interest. This is a factually based inquiry.

order to avoid having to quantify the decision's effect. (Letter from San Diego County Counsel, September 19, 2002.)

During discussions on these issues, a bright line standard, such as a dollar threshold, was proposed as a standard for determining what “substantially the same manner” means. Staff does not believe that this approach would alleviate (and it may aggravate) the concerns presented by the San Diego County Counsel since presumably “quantification” is difficult. Some information regarding the respective financial impacts on persons with ownership interests who comprise a “significant segment” is necessary as part of the “public generally” exception analysis. (See *Moock* Advice Letter, No. A-01-150.) Financial assessment cannot be avoided since the Act's conflict-of interest statutes (sections 87100 and 87103) regulate “financial interests” in a governmental decision. However, a fixed-dollar threshold may prove too inflexible to apply appropriately on a case-by-case basis.

Staff Recommendation 3: Staff recommends against defining “substantially the same manner” by using dollar thresholds at this time.

b. Examining Substantially the Same Manner - Broader Contexts

The phrase “substantially the same manner” is not unique to the Act. It has multiple applications in California Statutes,¹⁸ the California Code of Regulations,¹⁹ and has been used by California and other courts.²⁰ None of these sources, however, define this phrase. Nor is there a California Attorney General Opinion defining this phrase.

Former Government Code section 58259, which dealt with withdrawing land area from annexation, had the phrase “substantially the same manner” as its lynchpin; the question of whether land, once annexed to a jurisdiction, could be withdrawn was to be resolved by showing in a hearing whether certain services involving the land area were being performed in substantially the same manner by both jurisdictions. Unfortunately, notwithstanding the fact this section places the meaning of “substantially the same manner” squarely at issue, it offers no guidance on its face and there are no reported cases involving this former section (which was repealed in 1959).

¹⁸ See, e.g., Cal. Const. Article XIID § 6; Commercial Code § 9608; Elections Code § 1302.2; Government Code §§ 12736(f), 19587, 25211.171(b), 53316, 69894.3; Health & Safety Code § 33613; Pub. Resource Code §§ 9852, 26032, 32202; Pub. Utilities Code § 101124; Streets & Hwy Code § 8603; Water Code §§ 23541, 23876, 23911, 23913, 23915, 25113, 35549, 35950.5, 36421, 36423, 36425, 36436, 36447.1, 36501 (these sections largely deal with holding elections, fixing and collecting charges, and selling bonds); and Water Code App. §§ 8-111, 8-113, 54-14, 55-36, 65-14, 82-19, 88-20, 89-20, 91-20, 92-20.

¹⁹ See, e.g., Investment Code § 103.802 (Foreign Savings and Loan Assn.); Natural Resource Code § 13256.2 (Cal. Coastal Comm.); Public Revenue Code § 1642 (State Board of Equalization); Social Security § 100829 (Dept. of Community Services & Development); Gov. Code (6 references - FPPC, 4 other references - other agencies).

²⁰ See, e.g., (1938 Family Code opinion).

“Substantially similar” or “substantially the same manner” are phrases frequently employed in context of equal protection and commerce clause analyses under the U.S. Constitution. They also appear in numerous federal statutes.²¹ For example, the “Doctrine of Equivalents” is a long-standing, but obscure, doctrine under patent law. The doctrine pertains to the patentability of inventions and deals with “prior art”. Simplistically, if an invention performs a function in substantially the same manner as a previously patented invention, the two are deemed to be “equivalents” and the prior patent precludes the newer invention from obtaining a patent. Notwithstanding the widespread use of these phrases in federal practice, there are no federal appellate decisions or U.S. Supreme Court opinions explicitly defining these phrases. There are, however, two U.S. Supreme Court opinions²² that discuss the term “substantially similar.”

In the absence of an explicit definition, usage of the phrases “substantially the same manner” and “substantially similar” by the above-quoted sources leads to the conclusion that on a scale having “identical” at one extreme and “unique or peculiar” at the other, “substantially similar” has a meaning that is a near neighbor to “identical” and a stranger to “unique or peculiar”.

5. *Commission Advice*

General plan questions have arisen in a variety of factual contexts summarized below.

- *General Plan Decisions Impacting the Whole Jurisdiction:* A review of past Commission advice letters revealed that only in few instances do requests for written advice apply broadly to an entire jurisdiction. When they come up, decisions generally pertain to adoption of a general plan or major revisions to the plan. For example, the *Mattas* Advice Letter, *supra*, involved a review of the housing element, proposing to increase the number of dwelling units in the jurisdiction by over 4,000 units over a twenty-year period. The *Woodruff* Advice Letter, *supra*, pertained to the adoption by a city council of the city’s general plan.
- *General Plan Amendments which Clearly Affect an Identifiable Parcel or Area in the Jurisdiction:* Many requests involve general plan amendments which affect an identifiable parcel or area in the jurisdiction. For example, the *Montandon* Advice Letter, *supra*, dealt with an amendment to a city’s general plan by adoption of a circulation element. However, although this circulation element ostensibly applied to the entire jurisdiction, it had proposed construction of a median on a particular road within the city. Similarly, the *Solely* Advice Letter, *supra*, concerned a general plan amendment relating to “possible changes in the zoning classifications for properties located in the Washington Park, St. Vincent’s Hill, and Vallejo Heights

²¹ For example, section 12945(B)(2) of the Federal Employment and Housing Act requires that an employee returning from maternity leave be reinstated in the same or substantially similar job.

²² *Oregon Waste Systems v. Dept. of Environmental Quality*, 511 U.S. 93 (1994) (“*Oregon Waste*”); *Allegheny Pittsburgh Coal co. v. County Commission of Webster County*, 488 U.S. 336 (1989) (“*Allegheny Coal*”).

neighborhoods.” The proposed changes were, in part, to significantly decrease the number of units that could be added to those neighborhoods.

- *General Plan Amendments Initiated by Private Persons:* Frequently, general plan amendments for identifiable parcels are initiated, or closely related to actions initiated, by private persons . (See, e.g., *Hensley* Advice Letter, *supra*, developer acting as agent for property owner seeks general plan amendment; *Barrow* Advice Letter, No. *supra*, application by property owner for general plan amendment is likely; *Whittier* Advice Letter, No. A-99-257, owners want to build on their property and the uses of the property are under consideration as part of the town’s housing element; *Rudnansky* Advice Letter, *supra*, general plan amendment includes redesignation of the land use on specific property owned by developers also seeking conditional use permit.)

With respect to staff’s analysis, few advice letters discuss what is “substantially similar” in the context of general plan amendments. However, certain representative letters are now described in more detail in order to illustrate staff’s analysis.

Distance: Early written advice concerning the public generally exception, as applied to general plan decisions, typically involved a public official’s interest in real property located near or within an area, such as a development area, affected by the decision. Thus, when providing advice on the “substantially the same manner” prong of the exception,²³ in many instances staff examined the proximity of a public official’s property to property which triggered the conflict of interest.

Proximity, in this context, could sometimes be used as a surrogate for defining “substantially the same manner.” For example in the *Thorsen* Advice Letter, No. A-85-221, staff advised: “Because of the close proximity of their houses to the project, it is possible that the magnitude of the effects upon their real property interests will not be substantially the same as the magnitude of the effects upon the real property interests of a significant segment of the general public in Azusa.” In the *Joehnck* Advice Letter, No. A-87-322, staff advised: “Effects of the increased prices for lots in the subdivision will be diminished by the distance from the project. Thus, those properties which are closer will experience effects which are distinguishable from effects upon other properties which are more distant.” Also, in the *Faithful* Advice Letter, No. I-92-214, staff advised that property further removed from the “Hillside area” would not be affected in the same manner as property in close proximity to the Hillside area.

Minor or General Variations: Distance alone is not determinative. For instance, in the *Thorsen* Advice letter, *supra*, a public official was advised that if the general plan decision resulted in only general market price effects due to increased jobs or housing supply, all homeowners in the jurisdiction would be affected in substantially the same

²³ Early Commission opinions (e.g., *In re Owen*, *supra*, *In re Ferraro*, *supra*, *In re Gillmor* (1977) 3 FPPC Ops 38) laid out the broad principle that the public generally is the entire population of the jurisdiction and a significant segment thereof is a subgroup of the population that is large in number and heterogeneous in nature.

manner. Minor variations on all households also triggered the exception. For instance, when considering the effect of eliminating truck routes through a jurisdiction, a public official was advised that “the impact of the deletion of a truck route on a given household presumably comes in the form of diminished traffic, noise, etc., and perhaps, an increase in property or rental values. It would seem that this impact should be substantially the same (allowing for inevitable minor variations) on all households. Therefore, we advise that the public generally exception does apply in this case.” (*Libow* Advice Letter, No. A-97-616.)

Unique or Specific Effects: In the *Lindgren* Advice Letter, No. A-99-313, the decision in question was an amendment to a general plan dealing with the local coastal program, circulation element, housing element, and Georgia-Pacific (G-P) land use. The official was an employee of G-P. We advised that: “Given the unique size, location and character of G-P’s land, it is almost inevitable that changes to Fort Bragg’s general plan are linked uniquely to this property.” The letter concluded regarding public generally that “it is unlikely that a significant segment of Fort Bragg will be affected by the general plan update decisions in substantially the same manner as will G-P.”

Another letter in this category concerned an amendment to the general plan and zoning ordinance to allow for unlimited milk cows in the district. (*Moock* Advice Letter, *supra*.) The letter states generally: “The effects may be different depending on the size of the parcels. However, because Supervisor Oliveira is operating a dairy with attendant improvements on the property and has other dairy-related real property interests, all of which will be specifically affected by the adoption of the Dairy Element in terms of future expansion, his real property interests will be affected in a manner that is clearly different from the effect on the public generally.”

Ownership of Multiple Properties or Other Economic Interests: It appears that more frequently public officials are not able to apply the exception due to ownership of multiple properties or acreage and ownership of businesses.

Staff concluded that effects of a decision were distinguishable when a public official owns multiple properties in the same zoning category and members of the significant segment did not. In the *Kuhlemeier* Advice Letter, No. A-93-253, the decision in question was a general plan amendment and zoning changes. One official owned a variety of real property interests, including a single family residence and several rental properties. The letter concluded: “Your facts indicate you own multiple properties within each zoning category. Thus, for example, if it is determined that decisions will enhance the value of all the real property in the specific category in a similar amount, the number of properties you hold would mean that you would be affected multiple-times greater than the rest of the persons owning property in that zoning category. The only persons similarly affected would be those with the same number of properties. The group of persons holding so many properties would appear to be very small in relation to the population of the jurisdiction as a whole. Thus, the ‘public generally’ exception would not apply.”

In the *Huffaker* Advice Letter, No. A-86-343, the decision was an amendment to the general plan applicable to an area where the official's property was located. The official owned a substantial amount of real property. The advice concluded: "It is also apparent that the effect upon Mr. Planchon's interests will be distinguishable from the effect upon a significant segment of the general public. The map which you have provided indicates that the general plan amendments will affect a number of large parcels which are held by relatively few owners when compared with the total public of the jurisdiction, Contra Costa County. Thus, a significant segment of the population will not be affected in substantially the same manner." However, staff first advised in this letter that public officials could segment decisions to participate in some decisions.

In the *Zaltsman* Advice Letter, No. A-93-484, the county was confronted with a decision to amend the general plan and change zoned property requirements. The official owned 160 acres fitting within the new requirement. The letter concluded: "You stated that there are 40,000 property owners in the county and that approximately 7,000 of these property owners own land in the AWOS/AW area. However, of these 7,000 property owners, only 1,129 own 80 acres and above. At the time we spoke on January 11, 1994, you did not know how many of the 1,129 property owners owned between 80 - 320 acres, in other words, how many property owners would actually be financially affected by the pending decision. However, it was apparent that neither the ten percent threshold nor the 5,000 person criteria would be satisfied in any event. Thus, it did not appear that the 'public generally' exception would apply to permit Supervisor Rippey to participate in the decision."

The decision in question in the *Whittier* Advice Letter, No. A-99-256, was to amend the housing element of the general plan. The official owned seven interests in real property. The letter concluded: "Generally speaking, an official who owns several interests in real property that will be affected by a decision will not be affected in substantially the same manner as someone who has one or two affected real property interests."

Recently, in a letter to San Diego County, staff advised that it was unlikely that officials who owned significant acreage (one official owned 90 acres and the other owned more than 34 acres) were affected in the same manner as other members of the public with respect to certain general plan amendment decisions. (*Sansone* Advice Letter, *supra*.) Staff advised one official should use comparable sizes of land holdings to assess substantially similar financial effects. (See *Zaltsman* Advice Letter, *supra*.)

Based upon its analysis, staff observes that throughout the evolution of the public generally regulations, public officials have been consistently advised with respect to the public generally exception that:

Owners of multiple properties of the same description (typically zoning category) are financially affected in a manner that **is not** substantially the same manner as the effect upon members of the

significant segment who own only one property of that description (the “magnitude of effects” analysis); and

A financial effect that **is** substantially the same in manner is generally not present when the distance 1) between a public official’s real property and the real property within the general plan decision area is not comparable to 2) the distance between the latter and the real property owned by those comprising the significant segment.

In addition, it appears that much of the public’s concern with identifying the relevant “significant segment” has diminished after the 1993 adoption of numerical values to define significant segment. Finally, the most common economic interest prompting request for advice regarding general plan decisions is a public official’s economic interest in his or her principal residence.

IV. The Magnitude of the Problem and Possible Solutions

It is unclear whether an official’s potential disqualification from general plan decisions is an issue that is of widespread concern with respect to elected officials’ participation in governmental decisions. When this issue does arise, however, it is of particular importance to the public.

Two related staff memoranda discuss the County’s proposal and specific regulatory options that, if the Commission determines regulatory amendments or new regulations are needed, can serve as a basis for developing a regulatory approach.

Attachments:

Letter of San Diego County Counsel John Sansone, December 20, 2002 – Attachment 1
Regulation 18707.1 – Attachment 2

Legal:june2003memo:GeneralPlanJune2003memo.doc